

Rule 509. News Reporters.

(a) Definitions. As used in this rule:

(a)(1) "News reporter" means a publisher, editor, reporter or other similar person gathering information for the primary purpose of disseminating news to the public and any newspaper, magazine, or other periodical publication, press association or wire service, radio station, television station, satellite broadcast, cable system or other organization with whom that person is connected.

(a)(2) "Confidential source information" means the name or any other information likely to lead directly to the disclosure of the identity of a person who gives information to a news reporter with a reasonable expectation of confidentiality.

(a)(3) "Confidential unpublished news information" means information, other than confidential source information, that is gathered by a news reporter on condition of confidentiality. This includes notes, outtakes, photographs, tapes or other data that are maintained by the news reporter or by the organization or entity on whose behalf the reporter was acting to the extent such records include information that was provided on condition of confidentiality.

(a)(4) "Other unpublished news information" means information, other than confidential unpublished news information, that is gathered by a news reporter. This includes notes, outtakes, photographs, tapes or other data that are maintained by the news reporter or by the organization or entity on whose behalf the reporter was acting.

(b) Privilege for Confidential Source Information. A news reporter or confidential source has a privilege to refuse to disclose and to prevent any other person from disclosing confidential source information, unless the person seeking the information demonstrates by clear and convincing evidence that disclosure is necessary to prevent substantial injury or death.

(c) Privilege for Confidential Unpublished News Information. A news reporter has a privilege to refuse to disclose confidential unpublished news information, unless the person seeking such information demonstrates a need for that information which substantially outweighs the interest of a continued free flow of information to news reporters.

(d) Privilege for other Unpublished News Information. A news reporter has a privilege to refuse to disclose other unpublished news information if the person claiming the privilege demonstrates that the interest of a continued free flow of information to news reporters outweighs

the need for disclosure.

(e) *Who may Claim.* The privileges set forth in this rule may, as applicable, be claimed by the news reporter, the organization or entity on whose behalf the news reporter was acting, the confidential source, the news reporter or confidential source's guardian or conservator or the personal representative of a deceased news reporter or confidential source.

(f) *In Camera Review.* Once the court makes an initial determination that information which is claimed to be privileged under this rule should be disclosed, the court shall conduct an in camera review of that information before making a final determination requiring disclosure.

Advisory Committee Note. Protection of news gathering and dissemination has roots in the First Amendment of the United States Constitution. See *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Redding v. Jacobsen*, 639 P.2d 503 (Utah 1981). Since *Branzburg*, there has been an increasing but somewhat inconsistent development of the law concerning this privilege. Indeed, the extent of a federally-recognized privilege remains unclear. Many states have addressed the subject with legislation such that there is substantial variation in how the privilege may operate in different jurisdictions. The committee proposed this rule to address any uncertainty that may exist under Utah law and to provide for uniformity in the recognition of the privilege by Utah courts.

Although recognition of a reporter's privilege, as with all privileges, may limit the disclosure of specific facts in developing an evidentiary record in a particular case, the law has long recognized that some societal needs and values outweigh disclosure. To this end, the reporter's privilege has been recognized as important in assuring a continued free flow of information to those who gather and publish the news. See *Silkwood v. KerrMcGee Corp.*, 563 F. 2d 433 (10th Cir. 1977); *Bottomly v. Leucadia National Corp.*, 24 Media L. Rep. 2118, 1996 U.S. Dist LEXIS 14760 (D. Utah, July 2, 1966)(Boyce, J.) ; Edward L. Carter, *Reporter's Privilege in Utah*, 18 *BYU Journal of Public Law* 163 (2003).

This rule is intended to clarify the legal standard to be applied in determining whether a news reporter may be compelled to disclose information gathered in the course of reporting the news. The rule requires the court to consider the interests of the person seeking disclosure and the interests of the free flow of information to news reporters. In *Silkwood*, the court recognized that, in balancing the interests, the court should consider as factors (1) whether the party seeking the information has

attempted independently to obtain the information, (2) whether the information being sought goes to the heart of the matter, (3) whether the information is of certain relevance, and (4) the type of controversy. These are factors that should be considered by the court in weighing whether the need for the information outweighs the interest of a continued free flow of information to news reporters. As the law in this area continues to develop, the court should consider other factors found to influence the open and free flow of information that is vital to our culture and form of government.

The rule incorporates a relatively broad and flexible definition of news reporter to accommodate the ever-changing methods of expression and publication. While there are not many "lone pamphleteers" still functioning, they may have modern-day counterparts on the internet.

Because of the requirement that the court weigh the relevant criteria in deciding whether to require disclosure, the rule provides flexibility to address the different circumstances, many unpredictable, that may arise. The rule provides the greatest protection to the name of a confidential source or other information that would lead directly to the disclosure of the source's identity. See Subparagraph (b). The term "substantial injury" as used in Subparagraph (b) is not limited to bodily injury. For information obtained on condition of confidentiality, the rule requires the person seeking the information to demonstrate that under the balancing test set forth in *Silkwood*, and other relevant criteria the court may consider, the need for the information "substantially" outweighs the interests of society in protecting the information from disclosure. See Subparagraph (c). For other unpublished news information, however, the person claiming the privilege must demonstrate that the need to encourage the free flow of information outweighs the need for disclosure. See Subparagraph (d).

Although the rule does not contain exceptions to the privilege, recognizing that in most cases those issues will be resolved by applying the balancing test, the rule is not intended to limit or protect from disclosure those classes of information that by statute or other established law must be disclosed. See, e.g., Utah Code Annotated § 62A-4a-401 et seq. regarding child abuse reporting requirements, and §76-5-111.1 regarding vulnerable adult abuse reporting requirements.

Finally, subparagraph (f) adds additional protection to assure that a claimed need for information to be disclosed is not abused. Once the court determines that the party seeking disclosure has met the requirements under the balancing test, the court is then required to review the

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information in camera to confirm that the represented need for the information in fact balances in favor of disclosure. If upon review of the information the court is satisfied that the balance favors disclosure, the court may make a final determination ordering the information be disclosed. This additional protection is not intended to infringe on the court's general discretionary authority to review evidence in camera whenever it is deemed necessary.